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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners,*

v.

THE BALTIMORE & OHIO RAILROAD, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE BALTIMORE AND OHIO CHICAGO TERMINAL R.R. CO., THE NEW YORK CENTRAL RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC R.R., ILLINOIS CENTRAL RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, NORTHERN PACIFIC RAILWAY, SOUTHERN PACIFIC COMPANY, UNION PACIFIC RAILROAD, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, GULF MOBILE AND OHIO R.R.; EASTERN CARRIERS' CONFERENCE COMMITTEE; GUY W. KNIGHT, individually and as Chairman of EASTERN CARRIERS' CONFERENCE COMMITTEE; W. S. MACGILL, L. B. FEE, J. J. GAHERIN, R. L. HARVY, R. W. PECKARD, and G. C. WHITE, individually and as members of EASTERN CARRIERS' CONFERENCE COMMITTEE; WESTERN CARRIERS' CONFERENCE COMMITTEE; J. E. WOLFE, individually and as Chairman of WESTERN CARRIERS' CONFERENCE COMMITTEE; L. D. COMER, E. H. HALIMANN, A. D. HANSON, E. B. HERDMAN, G. E. MALLERY, and K. K. SCHOMP, individually and as members of WESTERN CARRIERS' CONFERENCE COMMITTEE; SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE; B. B. BRYANT, individually and as Chairman of SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE; W. S. BAKER, W. L. BURNER, JR., individually and as members of SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 28, 1962, Court of Appeals No. 13876.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported. The District Court did not render any opinion; its final order appears at P.A. 116-118,[1] and is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1962, and is appended hereto as Appendix C. The petitioners' petition for rehearing was denied on December 19, 1962. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Court of Appeals denies a plaintiff-appellant due process of law in violation of the Fifth Amendment to the Constitution of the United States where, in affirming a judgment of a District Court sustaining a motion to dismiss a complaint, the Court

[1] P.A. denotes the Appendix to Brief for Plaintiffs-Appellants in this case, below; D.A. denotes the Appendix of Defendants-Appellees in this case, below; No. 13855 P.A. denotes the Appendix to Brief for Plaintiffs-Appellees in No. 13855 in the court below; No. 13855 D.A. denotes the Appendix to Brief for Defendants-Appellants in No. 13855 in the court below.

of Appeals bases its affirmance on its own version of facts not stated in the complaint nor put in issue through any pleading but which the Court of Appeals resolves from disputed evidence introduced in the District Court in a hearing on an injunction pending appeal held after the motion to dismiss was sustained, without plaintiff-appellant having been afforded any opportunity to offer evidence in support of the merits of its complaint.

2. Whether a carrier subject to the Railway Labor Act may abrogate large numbers of rules governing matters of job content, crew consist, seniority, delineation of craft or class, place and manner of work, which have historically been the subject of collective bargaining in the railway industry, and unilaterally establish that henceforth there shall be no rules governing these matters but that from day to day the carrier, without notice to, or discussion with, the representatives of its employees, will determine these matters in its uncontrolled discretion.

3. Whether a carrier subject to the Railway Labor Act is required by that statute to deal with representatives of its employees and follow the procedures of that Act about changes in the carrier's assignment of work, job content, crew consist, place of work, length of runs, merging of crafts or classes, abolition of crafts or classes, merger of seniority lists and abolition of jobs.

4. Whether a carrier subject to the Railway Labor Act may lawfully abolish craft or class distinctions which that statute accepts as the basis for the machinery for collective bargaining and grievance adjustments established therein.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, appear in Appendix D, *infra*.

STATEMENT

The petitioners instituted this action by filing in the district court on July 26, 1962 their complaint for injunction and a declaratory judgment in which they sought to declare unlawful a "Promulgation of Revision in Work Rules" issued by the respondents on July 17, 1962. The promulgation attacked by the complaint stated that the rates of pay, rules and working conditions of the respondents' employees represented by the petitioners in collective bargaining would be changed as provided in the promulgation effective August 16, 1962, and stating that numerous rules governing large areas of what theretofore had been subjects of collective bargaining would be rescinded and such matters determined from day to day by management discretion. The complaint also sought to enjoin the respondents from putting the Promulgation in effect, on the ground that it was in violation of the Railway Labor Act (P.A. 1-49). This complaint was held by the district court to state a good cause of action (P.A. 127). The respondents elected not to defend the legality of their July 17, 1962 promulgation for they withdrew their promulgation and in the court room on August 6, 1962, served on the petitioners a second promulgation containing different terms, likewise to be effective August 16, 1962 (P.A. 116-17, No. 13855 D.A. 100, 104-106). The petitioners thereupon amended their complaint to seek declaratory and injunctive relief against the second promulgation as like-

wise in violation of the Railway Labor Act (P.A. 53-78, 130, 164).

The petitioners are unincorporated labor organizations which are the duly authorized and accredited representatives for the purposes of the Railway Labor Act of crafts or classes of employees constituting the so-called "operating" employees, such as engineers, firemen, conductors, brakemen and switchmen employed by the class of respondent railroads (P.A. 2).

All the railroads parties to the second promulgation are sued as a class, with the named respondents sued individually and as representatives of the class (P.A. 3, 53). Both the first promulgation and the second promulgation were issued on behalf of more than 200 railroads, including all but one of the major railroads (P.A. 3, 41-49, 53, 71-78). Each of the members of the class is a "carrier" as defined in section 1 of the Railway Labor Act and is subject to the provisions of that Act (P.A. 3).

The second promulgation is attached to the amendments to the complaint (P.A. 53-54, 57-78). The document is entitled as follows (P.A. 60):

> "Promulgation of Revisions in Work Rules
>
> "by each of the railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees, listed in Exhibits A, B, and C, attached hereto and made a part hereof, applicable to their operating employees, as shown and described in said exhibits, represented by:
>
> Brotherhood of Locomotive Engineers
> Brotherhood of Locomotive Firemen & Enginemen
> Order of Railway Conductors and Brakemen
> Brotherhood of Railroad Trainmen
> Switchmen's Union of North America"

The promulgation then recites (P.A. 60):

> "The following rules, rules changes and rates of pay will become effective at 12:01 a.m., August 16, 1962."

The promulgation is divided into three main headings: "I—Use of Firemen (Helpers) on Other Than Steam Power" (P.A. 61); "II—Basis of Pay and Assignment of Employees" (P.A. 61); "III—Consist of Crews" (P.A. 68). Except for the provisions setting forth the basis of pay (P.A. 61-65), the other provisions of the second promulgation consist for the most part of statements that management shall have an unrestricted right under any and all circumstances to determine all other aspects of the employee relationship and that all previous commitments impinging on such unrestricted power of management are abrogated. (P.A. 61, 65-70) For instance, with respect to the use of firemen on other than steam power, the second promulgation reads (P.A. 61):

> "1. Management has the unrestricted right, under all circumstances, to determine when and if a firemen (helper) shall be used on other than steam power in all classes of freight service (including all mixed, miscellaneous and unclassified services) and in all classes of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).
>
> "2. All agreements, rules, regulations, interpretations and practices, however established, are eliminated and cancelled to the extent that they conflict in any respect with the provisions of paragraph 1 of this rule."

With respect to "Road Train and Engine Service Assignments" the second promulgation provides (P.A. 65):

"1. The carrier has the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs * * *"

With respect to merging and consolidating seniority districts, all previous rules, regulations and practices, however, established, are abrogated if inconsistent with unrestricted management power subject only to the one limitation that the carrier "shall distribute the mileage ratably as between employees from the seniority district affected (P.A. 66). With respect to establishing a new run involving both the establishment of a new home terminal and operation through an established crew terminal, contrary to previous commitments, the second promulgation does provide for notice to the representative of the employees and opportunity for negotiation, but provides if no agreement is reached within 30 days, unless the representative of the employees invokes arbitration, the carrier may make the change free of any restriction (P.A. 66).

With respect to the "Combination of Road and Yard Service" the promulgation provides in what is designated as Rule II C that management may assign road crews to do yard work, may assign yard crews to do road work (P.A. 67), and that "Management has the exclusive right to designate and change switching limits, and to establish and abolish yard and hostling service and yard and hostling service assignments" (P.A. 68). It is announced that (P.A. 68):

"All agreements, rules, regulations, interpretations and practices, however established, are eliminated and canceled to the extent that they conflict

in any respect with the foregoing provisions of this rule II-C."

The second promulgation contains lists of subjects as to which management is asserting its unrestricted authority, as for instance the following:

> "Management has the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen and flagmen) shall be used in each crew * * * and if used the number and classification of the employees who will be so used; and when and if brakemen or helpers shall be used * * * and if used, the number and classification of employees who will be so used" (P.A. 68).
>
> "Management also has the unrestricted right, under all circumstances, to determine when and if more than one conductor shall be used" (P.A. 68).
>
> "Management has the unrestricted right, under all circumstances, to determine when and if engine, train and yard service employees shall be used on motor cars and self-propelled roadway and shop equipment and machines" (P.A. 69).

The amended complaint alleges that with respect to all the subjects dealt with in the second promulgation that the petitioners have for many years had collective bargaining agreements with the respondent carriers and the carriers represented by the respondents containing numerous and detailed rules (P.A. 5●). The amended complaint alleges that the carriers by announcing that effective August 16, 1962 there shall be no rule concerning broad subjects of traditional collective bargaining between petitioners and respondents violated Section 2, First of the Railway Labor Act (P.A. 55).

The complaint as amended prays for a declaratory judgment declaring the first and second promulgations invalid and in violation of the Railway Labor Act and that putting the contents of either of them into effect would be in violation of the Railway Labor Act (P.A. 55) and a permanent injunction against putting into effect the first and second promulgations (P.A. 55-56).

The only pleadings by respondents to either the original complaint or the amended complaint were motions made in open court to dismiss (P.A. 120, 164). No hearing to receive evidence was held on either the original complaint or the amended complaint. For the purpose of showing the withdrawal of the first promulgation and the issuance of the second promulgation, the district judge received a copy of the second promulgation in evidence as Carriers' Exhibit No. 1 (P.A. 124-25, 129-130). For the purpose of showing that the organizations served Section 6 notices as vague as the Carriers' second promulgation, the district court received in evidence (P.A. 156-157) as Carriers' Exhibit No. 2, a copy of a document before the Presidential Railroad Commission entitled "The Parties and the Controversy Before The Commission" (P.A. 81-115), in which the Carriers' Section 6 notices (P.A. 95-108) and the Organizations' Section 6 notices were included (P.A. 109). No other evidence was received prior to the entry by the court on August 8, 1962 of its formal order dismissing the amended complaint for failure to state a claim upon which relief can be granted. (P.A. 118). No pleading has ever been filed alleging any of the facts which the Court of Appeals later found controlling.

On appeal by the petitioners to the Court of Appeals for the Seventh Circuit, the judgment of the District

Court was affirmed. In its opinion handed down on November 28, 1962 (Appendix A, *infra*), the Court of Appeals does not appear to hold that the amended complaint, considered as a pleading, fails to state a claim upon which relief can be granted. Rather the Court of Appeals expressly ruled that in considering the case on appeal from the judgment sustaining a motion to dismiss it could judge the "merits of the case stated in the complaint as amended" on the basis of evidence introduced in the District Court after the motion to dismiss had been sustained and notice of appeal had been filed, which evidence had been introduced not for the purpose of judging the merits of the case, but solely on the question of the issuance of a temporary injunction pending appeal, including whether there should be an appeal bond and, if so, in what amount (see footnote 2, p. 3a, *infra*). The Court of Appeals commented that its view that in judging the merits of the case stated in the amended complaint it should consider evidence introduced in the hearing on the injunction pending appeal, was "in harmony with the liberal provisions of Rule 12 (b) (6) and (*c*) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 12" (footnote 2, 3a, *infra*).

In accordance with its thus announced ruling, the Court of Appeals then proceeds to make statements of fact as to matters highly disputed by the parties and as to which the petitioners were never afforded any hearing. While the opinion of the Court of Appeals is not clear it seems to find that the petitioners insisted on unreasonable rules which cost the carriers $592,062,000 in wage costs during 1961 (p. 6a, *infra*) that the petitioners by agreeing to the appointment of the Presidential Railroad Commission waived the usual

procedures of the Railway Labor Act in processing a certain notice of proposed change given to petitioners by the carriers on November 2, 1959 (pp. 8a, 14a, *infra*), that the respondents "accepted" the Report of the Presidential Railroad Commission but that petitioners "rejected" it (p. 9a, *infra*), that the petitioners engaged in "sterile discussion" (p. 15a, *infra*), "frustrated collective bargaining" (p. 17a, *infra*) and that "resort to collective bargaining" failed "without fault of management" (p. 15a, *infra*). Each of these apparent findings of fact rested on matters not appearing on the face of the amended complaint and never put in issue, and seemed to propound facts adverse to the petitioners on the basis of no evidence or conflicting evidence in a record developed for a temporary injunction pending appeal.[2]

The Court of Appeals seems to say that because of its view that management bargained in good faith but

[2] While we deem the evidence introduced in the hearing on an injunction pending appeal completely irrelevant to the sufficiency of the amended complaint, the highly controverted and inconclusive state of the evidence in that record shows that the facts adopted by the Court of Appeals were certainly not uncontroverted. The petitioners never conceded that any existing rules were unreasonable. As to the cost of the allegedly unreasonable rules the only evidence, a short one page statement by a witness for the carriers, was introduced solely for the fixing of the amount of an appeal bond (D.A. 180) and the trial court regarded it as inconclusive even for that purpose (No. 13855, P.A. 30). The first promulgation (P.A. 10-40) departed so substantially from the Report of the Presidential Commission as to raise doubts as to the accuracy of any notion that the carriers accepted the report (Tr. 57). The agreements signed in connection with the establishing of the Presidential Railroad Commission expressly negative any waiver of Railway Labor Act procedures (P.A. 86, No. 13855, P.A. 31-2). The notion that collective bargaining on the November 2, 1959 notices failed without fault of management is refuted by evidence that the carriers never negotiated on these notices (No. 13855, P.A. 6, 34).

labor did not, the respondents thereby became legally entitled to promulgate management prerogatives otherwise impermissible (pp. 15a-16a, *infra*).

With respect to the petitioners' contention that the second promulgation was illegal in that the carriers thereby wipe out the craft or class concept on which the Railway Labor Act is premised, the Court of Appeals stated that since, in its view of the facts, the same organizations represented employees in both road and yard service in the several classes or crafts,[3] the wiping out of class or craft distinctions would have no practical consequences and anyway this involved the carriers' assignment of work which is a subject with which the Railway Labor Act does not deal (p. 17a, *infra*).

If the Court of Appeals did not mean to rule that management prerogatives arise as sort of a penalty for labor's failure to bargain in good faith, the opinion might be read as holding that the extent of management prerogative is under the Railway Labor Act itself a subject for bargaining, as to which management can unilaterally impose its own definition of scope of management rights when labor and management after exhausting Railway Labor Act procedures fail to reach

[3] In making this ruling the Court of Appeals quoted from, and adopted as its own, and relied exclusively upon, a statement from the brief of the carriers (p. 17a, *infra*). While, of course, the evidence as to whether the same organizations represent road and yard employees was not before the court, we are certain the carriers would admit, despite the generality of the statement in their brief, that the Switchmen's Union of North America represents only Yard employees and that carriers could wipe out the craft or class basis upon which the existence of that union depends if they carried out the obliteration of yard class or craft which the carriers promulgated as their unrestricted right (P.A. 67-68).

an agreement defining the scope of management prerogatives (pp. 15a-16a, *infra*. The opinion may also be read as holding either expressly or impliedly, that the subjects dealt with in the promulgation are within management prerogative and hence not mandatory subjects for bargaining under the Railway Labor Act (p. 15a, *infra*).

On December 13, 1962, the petitioners filed a petition for rehearing in the court below pointing out that the Court of Appeals had denied petitioners due process of law in violation of the Fifth Amendment to the Constitution of the United States in considering and basing its decision on findings of fact made by the Court of Appeals on the merits of the case without the petitioners having been confronted with any issues of fact on the merits and without the petitioners having been afforded an opportunity to introduce any evidence on such issues and without findings by the trial court (pp. 1-7, petition for rehearing).

The Court of Appeals denied the petition for rehearing on December 19, 1962 without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals denied petitioners procedural due process of law in violation of the Fifth Amendment to the Constitution of the United States by admittedly considering disputed evidence to determine facts which were never put in issue or tried. In affirming the dismissal of the amended complaint on the basis of evidence introduced on different issues and for a different purpose, without affording petitioners any opportunity to introduce evidence in support of the merits of the case stated in their amended complaint, the Court of Appeals failed to follow the rule

stated in *Saunders* v. *Shaw*, 1917, 244 U.S. 317. Cf. *Georgia Railway & Electric Co.* v. *Decatur*, 1935, 295 U.S. 165, 171; *Jacobsen* v. *Jacobsen*, App. D.C. 1942, 126 F. 2d 13, 14-15. In *Saunders* v. *Shaw*, this Court held that an appellate court denies a litigant due process of law when it bases its decision on a fact which the trial court deemed immaterial and as to which no issue was tried.

While *Saunders* v. *Shaw* arose under the Fourteenth Amendment, the same constitutional right to procedural due process of law in the federal courts has been provided in the Fifth Amendment. Cf. *Jacobsen* v. *Jacobsen*, App. D.C., 1942, 126 F. 2d 13, 14-15.

Here the deprivation of due process is even clearer than in *Saunders* v. *Shaw*. The trial court by sustaining the motion to dismiss ruled all evidence immaterial—the amended complaint in his view failed to state a claim which could be supported by any evidence—hence petitioners were given no opportunity to introduce any evidence in support of the merits of their case. Except for the second promulgation which respondents introduced as Carriers' Exhibit 1 to establish the mootness of the original complaint (P.A. 124-25, 129-30) and copies of the Section 6 notices as Carriers' Exhibit 2 to show that the organizations' Section 6 notice was as vague as the carriers' (P.A. 156-7), no evidence whatever was received prior to the formal order dismissing the amended complaint or the filing of the notice of appeal.

Only after the notice of appeal was filed was any testimony received by the trail court. And then the evidence was not received on the merits of the case stated in the complaint. The evidence was introduced solely

for the purpose of petitioners' motion for injunction pending appeal. On this issue petitioners were successful. The district court found they had made out the kind of a case necessary for an injunction pending appeal and made findings in their favor (No. 13855, D.A. 90-94) and entered the requested injunction (No. 13855, D.A. 94). This injunction was affirmed by the Court of Appeals on November 28, 1962. Thus this is not even a case where evidence is drawn from a record in which the litigants failed to meet their burden on the issues then before the court. Petitioners had no duty to attempt to go further in the hearing on injunction pending appeal and try to prove their case on the merits. The instant case hence is like the *Saunders v. Shaw* case in that the appellate court has considered material on the appeal, facts not tried in the trial court because they were deemed immaterial by the trial court.

Here there can be no dispute that the Court of Appeals considered on the appeal evidence that was not before the trial court on the motion to dismiss. The Court of Appeals expressly states in footnote 2 of its opinion (p. 3a, *infra*) that it did consider the evidence introduced in the hearing on injunction pending appeal in deciding the "merits of the case stated in the complaint as amended." We believe this statement itself proves a deprivation of petitioners' constitutional rights. That the Court of Appeals considered evidence when petitioners never had any hearing at which they could introduce evidence on the issue for which it was considered, violates due process of law.

However, we are not here left solely with the Court of Appeals' statement that it considered this evidence in deciding the merits of the complaint. The court's

opinion is filled with recitals of alleged facts which do not appear in the complaint as amended, as to which no issues were tendered in the district court, and as to which petitioners were never afforded a hearing. For instance, the crucial recital that the petitioners engaged in sterile discussion and frustrated collective bargaining which failed through no fault of management (pp. 15a-17a, *infra*) rests on the Court's adoption of a view of the facts which was not even argued to either the trial court or the Court of Appeals by respondents. Thus petitioners were never put on notice that such an issue would be deemed relevant.

The assumption of the Court of Appeals (footnote 2, p. 3a, *infra*) that Rules 12(b) (6) and (c) of the Federal Rules of Civil Procedure support its consideration of this evidence is inaccurate. These rules have uniformly been construed, both by the Court of Appeals for the Seventh Circuit[4] and by other courts,[5] as not authorizing the determination of disputed facts on a motion to dismiss.

Nor is there any support for the Court of Appeals' implication in the some footnote that counsel for petitioners "concede" that the court "may" consider evidence outside the complaint on the issue before it. The statement in the brief referred to was addressed to the defendants-appellees' "Supplemental

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[4] *Butcher* v. *United Electric Coal Co.*, 7th Cir., 1949, 174 F. 2d 1003; 1006; *Grand Opera Co.* v. *Twentieth Century Film Corp.*, 7th Cir., 1956, 235 F. 2d 303, 307.

[5] *Herron* v. *Herron*, 5th Cir., 1958, 255 F. 2d 589, 593; *Chappell* v. *Goltsman*, 5th Cir., 1950, 186 F. 2d 215, 218; *Slagle* v. *United States*, 5th Cir., 1956, 228 F. 2d 673, 677-678; *Hoy* v. *Progress Pattern Company*, 6th Cir., 1954, 217 F. 2d 701, 704; 2 Moore's Federal Practice, 2d ed., pp. 2255-2257.

Statement of Facts" and was directed to the irrelevance of those recitals to the issue of whether the complaint states a cause of action.[6] The introductory clause that we do not "here" question that "a Court" may consider matter in another record was for the purpose of emphasizing that the point being made was not the technical one of in which record matters appeared but went to the substantive impropriety of considering anything outside the complaint. When the brief was submitted there was of course no reason to anticipate that the Court of Appeals would completely depart from established standards of due process as it subsequently did.

The review of this case by this Court is imperative to preserve the right to procedural due process of law in the federal courts.

2. This case presents what is probably the most important issue that has yet arisen as to the interpretation and application of the Railway Labor Act. It presents the issue of the extent, if any, to which the Railway Labor Act leaves carriers with managerial prerogatives with respect to rates of pay, rules, and working conditions. This Court in construing the collective bargaining provisions of the National Labor Relations Act (29 U.S.C. 151, *et seq.*), held that the National Labor Relations Board could not decide cases on a fixed view that all insistence by employers on

[6] The sentence reads: "While we do not here question that a Court may consider such materials so presented if it chooses, we submit this Court should not do so on this appeal because the materials so presented are irrelevant to this appeal." The brief then proceeds to point out the irrelevance of the specific recitals of defendants-appellees to whether the amended complaint states a claim on which relief could be granted.

management prerogative clauses was illegal without regard to whether the subjects covered by management prerogative were historically subjects of collective bargaining in the industry. *N.L.R.B.* v. *American National Insurance Co.*, 1952, 343 U.S. 395, 408. There this Court was dealing with collective bargaining on behalf of office employees of an insurance agency in Galveston, Texas. There had been no history of collective bargaining. While this decision has been criticized in persuasive terms by outstanding authorities on labor law as making the content of the duty to bargain depend on the state of collective bargaining in the industry,[7] there has never been any suggestion anywhere

[7] See, *e.g.*, Nathan P. Feinsinger, The National Labor Relations Act and Collective Bargaining 57 Mich. Law Rev., 807, 816 (April 1959), who states:

> "To the extent that the *American National Insurance Co.* holding is based on pre-Wagner Act practice, it is questionable. Previously, the union had no legally enforceable right to insist on anything; its sole resort was to economic force. The National Labor Relations Act, imposing on the employer the legal duty to bargain on 'rates of pay, wages, hours of employment, or other conditions of employment' changes the picture. The duty to bargain includes the obligation to recognize the role of the union as a joint participant in the establishment of employment standards. By insisting on a management prerogative clause covering statutory subjects of collective bargaining the employer seeks to withhold such recognition. The employer may properly propose such a clause, but it is difficult to see how the union may be forced to accept the proposal and thereby surrender a statutory right as the price of an agreement. There is no real distinction between an employer's refusal to agree to any standard to govern working schedules, for example, and a refusal to consummate an agreement unless the union agrees to the removal of that subject from the bargaining table. Pre-Wagner Act practice is not in point, because under that practice the employer was legally free to take either position. There is no basis for inferring that Con-

before this case that an employer could insist on management prerogative over a subject which has traditionally been a subject of collective bargaining not only in the industry but also between the specific employer in question and his employees. Both the courts[8] and the National Labor Relations Board[9] have uniformly held that once a subject has been established as a collectively bargained item between an employer and his employees or in the industry, the employer may not insist on his management prerogative. While as to any subject or group of subjects the employer may pro-

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gress intended to prevent him from one position but not the other.

"The court's criticism of the Board's approach as an attempt to pass judgment on the *reasonableness* of the employer's proposal is likewise open to question. As the court viewed it, the Board was attempting to require the employer to make a 'concession' in disregard of the express language of section 8 (d). This criticism would be valid if the employer had proposed a particular standard for a work schedule, for example, which the Board condemned as unreasonable on the merits. In the case in question, however, the employer had proposed that it have complete discretion on the subject, which means no standard at all. By its holding, the Board was not requiring a 'concession,' but was simply requiring the employer to recognize the union's right to full joint participation with management in the establishment and promulgation of standards of employment, which the court in the *Heinz* case had treated as an essential element in the collective bargaining process."

[8] *Majure Transport Co.* v. *N.L.R.B.*, 5th Cir., 1952, 198 F. 2d 735; *Aluminum Ore Co.* v. *N.L.R.B.*, 7th Cir., 1942, 131 F. 2d 485, 487; *Singer Mfg. Co.* v. *N.L.R.B.*, 7th Cir., 1941, 119 F. 2d 131, 136, certiorari denied, 313 U.S. 595; *N.L.R.B.* v. *Berkley Machine Works & Foundry Co.*, 1951, 4th Cir., 189 F. 2d 904; *N.L.R.B.* v. *Allison & Co.*, 6th Cir., 1948, 165 F. 2d 766.

[9] *"M" System Inc.*, 1960, 129 N.L.R.B. 527, 551; *Duro Fittings Co.*, 1961, 130 N.L.R.B. 653, 660-2; *Mooney Aircraft Inc.*, 1962, 138 N.L.R.B. No. 136.

pose that the union waive its joint participation in establishing standards, the employer cannot insist either that the union negotiate the question of whether joint participation should be waived or that it can promulgate its management prerogative as the applicable method of governing the matter in the future. Indeed, the National Labor Relations Board has held that a union violates its duty as the representative of its constituency if the union waives its rights to participate without obtaining a substantial *quid pro quo* for the employees in return for its waiver. *"M" System, Inc.*, 1960, 129 N.L.R.B. 527, 551;

In the instant case the complaint as amended alleged that all the subjects which the second promulgation declared to be within management's unrestricted rights had for many years been covered by numerous and detailed rules contained in collective bargaining agreements between the petitioners and respondents and that "for many years it has been the custom, practice and usage for said collective bargaining agreements to contain such rules" (P.A. 54). There can thus be no basis upon which the carriers can, consistently with the Railway Labor Act, announce that from August 16, 1962, there shall be no rules about these subjects but instead they shall be governed by management's unrestricted discretion. This case unlike *Order of R. Telegraphers v. Chicago N. W. Ry. Co.*, 1960, 362 U.S. 330, is not pivoted on the issue of what is included within the subjects of mandatory bargaining. The Promulgations, both the first and second, avowedly deal with "rules" governing the employment relationship; they are each denominated "Promulgation of Revisions in Work Rules". And "rules" is one of the subjects of mandatory bargaining specifically named in the Railway Labor Act.

The opinion below has the effect of repealing as to operating employees those provisions of the Railway Labor Act imposing the duty to make and maintain agreements concerning rates of pay, rules, and working conditions. For a bargain about wages or hours of work is meaningless if the carrier retains the uncontrolled discretion to determine the nature, extent, type, place and manner of work. A bargain defining wages and hours but not job assignment is like a bargain to buy 100 acres of real estate for $1,000 with the buyer having the right to take whatever kind of land he wished—wooded, mineral, fertile, industrial, grazing, orchard or desert. The legislative history of the Railway Labor Act shows that the draftsmen considered that the term "rules" served in the railroad industry to define the *quid pro quo* for rates of pay—that is to define what the worker was contracting to furnish the employer in return for the agreed wage. See 67 Cong. Rec. 8812-8813, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 7180, 69th Cong., 1st Sess., January 27, 1926, p. 56. Indeed, detailed rules on all the subjects covered by the second promulgation long antedated the enactment of the Railway Labor Act. The draftsmen premised the Act on the existence of these rules and expressly stated their intention to impose the legal duty to have all these matters determined by the joint participation of labor and management.[10]

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[10] 67 Cong. Rec. 4651, 4665, 4703; Hearings on S. 2646, 68th Cong., 1st Sess., Senate Committee on Interstate Commerce, March 18, 1924, pp. 16-17; Hearings on H.R. 7180, 69th Cong., 1st Sess., House Committee on Interstate and Foreign Commerce, January 28, 1926, p. 66.

The court below by treating the extent of management prerogative as to wages, hours, and conditions of employment as a bargainable subject and by failing to recognize it was thereby placing it in an employer's discretion whether to permit union participation at all, has construed the Railway Labor Act in a manner which calls for the consideration and guidance of this Court. The instant case is itself of tremendous importance. Substantially all the railroads in the country are involved. Utter chaos will follow if established practices of collective bargaining are summarily destroyed, as they will be if the promulgations are not enjoined. The principle involved is likewise basic to labor relations not only in the railroad industry but also in industry generally. Unless corrected the decision below invites emulation with resulting turbulence.

The case is thus one which calls for the issuance of the writ of certiorari to review the construction placed on the Railway Labor Act.

3. To the extent that the Court of Appeals bases its decision on the view that subjects dealt with in the promulgation are not covered by the Railway Labor Act, it presents an important question of federal law. We believe that under the principles affirmed by this Court in *Order of Railroad Telegraphers* v. *Chicago & N.W.Ry.Co.*, 1960, 362 U.S. 330, the court below was clearly wrong when it adopted as its own the carriers' statement that assignment of work is a subject with which the Railway Labor Act does not deal (pp. 17a, *infra*). Assignment of work is equally within the words defining subjects about which bargaining is required by law—it is a condition of employment. The assignment of work as a subject of mandatory

collective bargaining is equally within the spirit and intent of the provisions of the Railway Labor Act imposing on carriers and employees the duty to attempt to reach an agreement.

4. The question of the extent to which carriers may properly abolish crafts and classes, as by merging yard and road service, is also of importance in the administration and application of the Railway Labor Act. The Railway Labor Act repeatedly presupposes the integrity and recognition of class or craft, and bases its structure and functioning on the existence of established crafts or classes. Unlike the National Labor Relations Act it does not leave the delineation of appropriate bargaining units to *ad hoc* determination; Section 2, Fourth provides that the majority of any craft or class shall determine the representative of the craft or class. The craft or class unit is a dominant feature of the union-shop amendment contained in Section 2, Eleventh. The National Railroad Adjustment Board provisions are predicated upon the existence of the five national organizations who are here petitioners by providing for five members of the First Division of the National Railroad Adjustment Board to be designated by national organizations representing operating employees. Section 3, First (h).

The second promulgation abolishes all rules limiting the assignment of yard crews to perform both road and yard service, abolishes many rules limiting the use of road crews to do yard work, and states management's exclusive right to abolish yard service (P.A. 67-68). The report of the Presidential Railroad Commission describes the road-yard service proposals of the carriers as follows (p. 177):

> "The Carriers' Proposal for all practical purposes would completely obliterate the distinction between road and yard service. They propose a merging of all road and yard seniority lists."

If road and yard seniority lists were merged, the petitioner Switchmen's Union of North America would be left without any craft or class to represent, for it represents only yard employees. This craft or class has existed since the beginning of railroads in this country and has been represented by the Switchmen's Union of North America since before the turn of the century. We know of no governmental study which has ever suggested abolishing the craft or class. The Presidential Railroad Commission not only rejected the carriers' proposal as without foundation but found that collective bargaining had been working effectively to settle most problems of delineation between road and yard service. Thus, the Report states (p. 176):

> "The proposal as made by the Carriers involves broad and sweeping changes in the traditional concepts of the separability of road and yard service. The record does not support the need for such changes * * *.
>
> "* * * the machinery provided for the extension of switching limits has been working well; so well, as a matter of fact, that in a majority of instances, in which the carriers have proposed switching limit extensions, agreements have been reached without resort to arbitration."

The decision of the Court of Appeals accepts as true a general statement in the carriers' brief that the several classes or crafts involved are represented by the same organization whether they work in road or

yard service. This is not true with respect to the Switchmen's Union of North America, which admittedly represents only employees working at yard work. This is another instance in which the court below denied petitioners due process of law by finding facts where no trial of the issue was had. But completely aside from the due process point, the assumption by management of the right unilaterally to abolish crafts or classes, is, we submit, a violation of the Railway Labor Act.

While the court below did decide this issue, it suggested that the petitioners had not raised it in the District Court (p. 17a, *infra*). But the wiping out of crafts or classes was one result of the absence of rules and hence was raised by the amended complaint in its attack on the second promulgation as illegal because of its announcement that there would be no rules concerning assignments and clasification of assignments except in road passenger service (P.A. 54-55).

The Court of Appeals also adopted as its own (p. 17a, *infra*) the statement in the carriers' briefs that the petitioners' attack on the promulgation as abolishing crafts and classes goes merely to the assignment of work and that the Railway Labor Act does not deal with this subject. But the abolition of the distinction between yard and road work raises more than a question of assignment of work—it raises the question of destruction of a collective bargaining unit by managerial fiat. Nor is it sound law to hold that an assignment of work is not a bargainable issue.

The second promulgation not only permits a complete obliteration by the carriers of the entire basis

for the existence of the Switchmen's Union but allows carriers to obliterate distinctions between other crafts and classes.

We submit that the question of whether under the Railway Labor Act, such destruction of established crafts or classes may legally be accomplished by unilateral carrier decree, is an important question requiring decision by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit, that writ of certiorari should issue to review the judgment of the court below and that this Court should hold that petitioners are entitled to a trial on their complaint as amended.

Respectfully submitted,

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January 8, 1962

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13876 SEPTEMBER TERM, 1962 SEPTEMBER SESSION, 1962

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Plaintiffs-Appellants,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *et al.*,
Defendants-Appellees.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 28, 1962

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* A complaint was filed in the District Court by plaintiffs, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, unincorporated labor organizations. It designated as defendants, The Baltimore & Ohio Railroad Company and fifteen other named railroad companies, described as representatives of a class of railroads that

is so numerous (more than 200) as to make it impracticable to bring them all before the court.

The complaint sought a judgment declaring unlawful a July 17, 1962 Promulgation of Revision in Work Rules issued by defendants, with respect to defendants' operating employees represented by plaintiffs in collective bargaining duly authorized under the Railway Labor Act, 45 U.S.C.A. § 151, *et seq.* Each of the members of the class represented by defendants is a carrier as defined in § 1 of the Act.[1]

On August 6, 1962 at the conclusion of arguments on a motion of the Carriers to dismiss the complaint, they were permitted by the court and without objection from the Organizations, to withdraw their July 17, 1962 promulgation of rules changes. The Carriers then by letter issued a promulgation of rules changes dated August 6, 1962, which stated that the changes proposed by the Carriers in their notices served under § 6 of the Railway Labor Act (45 U.S.C.A. § 156) on November 2, 1959 would become effective August 16, 1962. The Organizations thereupon amended their complaint to seek similar relief against the later promulgation.

On August 8, 1962, the court, after hearing arguments upon the Carriers' motion to dismiss, entered an order dismissing the amended complaint for failure to state a claim upon which relief could be granted and also denying a motion for a preliminary injunction based thereon. The Organizations appealed from that order and moved for an injunction pending appeal, under 28 U.S.C.A. Rule 62 (c). This injunction was granted on August 10, 1962. In our case No. 13855 we heard arguments on a motion of the Carriers to dissolve and vacate that injunction and on August 15, 1962 we denied the motion. We have this day disposed of that case.

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[1] Plaintiffs are sometimes hereinafter referred to as the Organizations and defendants will at times be referred to as the Carriers.

In case No. 13876 there was evidence tending to prove the facts which we now summarize.[2]

By letter dated February 10, 1959, President Loomis of the Association of American Railroads invited the Organizations to join with the Carriers in seeking the creation of a presidential commission to investigate and make a report on rules about which the Carriers complained, and, more particularly, the impact of the existing rules on the public welfare.

This proposal was rejected by the Organizations on June 4, 1959 in a letter to President Loomis. At the same time they addressed a letter to the Secretary of Labor of the United States, in which it was stated:

> "In the event that an effort is made by Mr. Loomis or the railroad representatives to induce President Eisenhower to appoint a board or commission to investigate what they term 'featherbedding of railroad employees', we hope that you will see fit to suggest to the President that such a board or commission should

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[2] The Organizations in a reply brief submit that, on this appeal, we should not consider certain factual matters appearing from evidence in the record, because they are *irrelevant* on this appeal. They do concede, however, that they do not question that we may consider such material if we choose. The criticism is directed at facts proved by the Carriers before the district court in connection with the Organizations' motion for injunction pending appeal hereinbefore referred to, *supra*.

We do not deem it our duty to close our eyes to relevant facts actually appearing before us in the record. The mere occasion for their proof does not render them irrelevant. We hold that this evidence was relevant, not only on the question of the issuance of an injunction pending appeal, but also on the merits of the case stated in the complaint as amended. Both phases of the case involved the same general subject matter and the identical parties. Cf. *United States* v. *Nuddelman*, 7 Cir., 104 F. 2d 549, 552; and also *Wilson* v. *Calculagraph Co.*, 1 Cir., 153 Fed. 961, 962.

This view is in harmony with the liberal provisions of Rule 12 (b) (6) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A. Rule 12.

not be appointed; but that if any investigation is to be made, it should be made along the lines of the Report of Emergency Board No. 109 and take into consideration all phases of the industry, including managerial and financial practices, instead of singling out the operating employees exclusively."[3]

Testimony at the trial supports the factual allegations in a letter by Mr. Loomis to the President of the United States, under date of August 17, 1959, from which we quote:

"1. For more than 20 years, efforts have been made to negotiate changes in the light of the great technological improvements in the industry, but such efforts have produced no substantial or meaning. l relief.

"2. Continued existence of these rules imperils employment in the industry. In the last decade, an average of 1,000 jobs a week has been lost, and an even greater loss is inevitable if the rules are not modernized in keeping with mid-Century operating practice and competitive reality.

"3. Need for a broad study of the wage and rules structure by a special Presidential Commission has been noted by numerous Presidential Emergency Boards, including Board No. 109, which you appointed in 1955. This Board stated clearly: 'There is imperative need in this industry and specifically in the operating classifications for a thoroughgoing review and modernization of the internal wage structures. Indeed, such a review and rationalization is long overdue.' That Board was immediately concerned with the question of wage differentials between classes of employees but its recommendation constitutes a clear recognition that a broad study of the operating wage and rules structure such as is now sought calls for the appointment of a special Presidential Commission.

[3] The term "featherbedding" did not appear in Mr. Loomis' letter.

"5. The Interstate Commerce Commission, in its landmark report of May 18, 1959, on the railroad passenger deficit problem, called for a public review and revision of working rules for railroad employees.

"6. A study now, in an atmosphere of calmness, can achieve far more effective results than fact-finding by the Presidential Emergency Board provided for by law if the issue threatens a transportation tie-up. As the current three-year moratorium on work-rule changes expires on October 31, 1959, it seems to us most urgent that action be taken in advance of possible crisis and while there is still time for rational decisions in the national interest.

"7. Finally, and perhaps most important, drawing up sound, new work standards for the railroad industry has become so complex and challenging that the machinery provided for settling ordinary disputes appears hopelessly inadequate to cope with this task. Only a new, broader-based and determined approach has real hope of coming up with workable and fair solutions.

"For all these primary reasons, Mr. President, railroad management appeals to you to appoint a commission clothed with the objectivity and prestige of your office to examine this problem from the standpoint of the public's interest, and to recommend steps to bring these rules into line with modern conditions to the benefit of all parties concerned."

On August 24, 1959, the Organizations wrote to the President opposing his appointment of a Commission and urging a policy of non-government intervention.

The President, by letter dated September 9, 1959, refused to appoint a commission.

On November 2, 1959, the Carriers served on the representatives of the Organizations, pursuant to the provisions of Section 6 of the Railway Labor Act, notices of intended changes in agreements affecting rates of pay, rules and working conditions, which proposed changes are now be-

fore this court. These proposed changes in existing agreements contemplate the following:

1. The elimination of existing rules and agreements requiring the use of firemen on other than steam locomotives when used in yard and freight service.
2. The revision of rules governing the basis of pay and the assignments of railroad operating employees used in through freight and straightaway passenger service.
3. The elimination of rules requiring the use of a stipulated number of trainmen in road train crews and a stipulated number of brakemen (helpers) in yard ground crews.
4. The elimination of rules requiring the use of operating employees on motor cars and self-propelled work machines used in inspection, construction, repair and maintenance work, and
5. Various miscellaneous and minor other changes which are not material in these proceedings.

The evidence in the record is to the effect that certain rules contained in existing agreements between the Carriers and their operating employees, during the year 1961, cost the railroad industry $592,062,000 in wage costs for unneeded employees occupying redundant positions, pay for time not worked, compensation that was not commensurate with the value of the services rendered, and the cost of owning and maintaining equipment and facilities that would not be required apart from the restrictions placed upon the efficiency and economy of operations by such rules.

Following service of the Carriers' notice, the proposals therein contained were the subject of conferences on individual railroads, but no agreements were reached. On June 9, 1960, the Carriers requested concerted national handling of their proposals by national bargaining commit-

tees designated by the Carriers and the Organizations. Meetings of such national bargaining committees were begun on July 6, 1960, and extended through October 17, 1960. During such national conferences the Organizations contended that the ordinary processes of the Railway Labor Act were not suited to handling the Carriers' proposals, and now urged that the parties agree to refer the Carriers' proposals and such other proposals as either party might desire to submit to "a special wage study commission." This merely produced further correspondence.

On October 17, 1960, an agreement was entered into between the Carriers and the Organizations, under the auspices of the Secretary of Labor, providing for the creation of a Presidential Railroad Commission to investigate the facts and report its findings and recommendations to the President with respect to the controversy between the parties—substantially as proposed by the Organizations. It was further provided in said agreement that the "controversy between the parties" involved the proposals of the Carriers contained in their Section 6 notices of November 2, 1959, and proposals of the Organizations served on the Carriers on September 7, 1960 (both of which were attached to the memorandum) "including any implementing proposal or proposals that may be submitted to the Commission." The memorandum also contained, among others, the following provisions:

> "2. • • • The Commission may recommend that any proposal or implementing proposal or any part of any such proposal should be rejected in whole or in part or accepted in whole or in part, or should be accepted as amended or revised by the Commission, as it finds under the evidence to be justified.
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> • • • • • •
>
> "4. • • • The Commission shall also be authorized to use its best efforts, by mediation, to bring about an amicable settlement and agreement between the

parties with respect to any issue concerning which the evidence has been heard.

"5. It is the intent of the parties that the proceedings of the Commission, including its mediatory efforts and its report *shall be considered and accepted as in lieu of the mediation and emergency board procedures provided by Section 5 and 10 of the Railway Labor Act.* (Italics supplied.)

"National conferences between the parties under the Railway Labor Act shall be resumed and expedited, provided no settlement is sooner reached, immediately following the report of the Commission.

"In the event the National Mediation Board shall proffer its services, or the Board's services be invoked, the parties will jointly request the Board to expedite mediation and as promptly as feasible terminate the Board's services under the Act."

The Organizations thereafter expressed their entire satisfaction with the arrangements stipulated in the agreement, and reasserted their contention "that the work rules problem is 'too difficult' to be resolved under the regular procedures of the Railway Labor Act"; and on November 1, 1960, the Presidential Commission requested by the parties was duly created by Executive Order No. 10891.

The members of the Commission were appointed by the President on December 22, 1960. Five of the members of the Commission were appointed from nominations submitted by the Organizations, five members from nominations submitted by the Carriers, and five public members were appointed without nominations from the parties.

The Commission began its hearings on February 16, 1961, and delivered its report and recommendations to the President on February 28, 1962. There were 15,500 pages of oral testimony and thousands of pages of exhibits received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its

work by a staff of independent technical experts. Beginning in October, following the fact gathering stage of the Commission's proceedings, the public members of the Commission sought to narrow the issues and mediate the differences between the parties, but no agreement was reached.

When the report and recommendations of the Commission were delivered to the President on February 28, 1962, he requested the parties to enter into immediate and expeditious collective bargaining over the issues which remained in dispute. National conferences were resumed on April 2, 1962, and continued through May 17, 1962. The Carriers accepted the report and recommendations of the Presidential Commission but its report and recommendations were rejected by the Organizations, and no agreement was reached.

On May 21, 1962, the Organizations made application for the mediation services of the National Mediation Board under Section 5 of the Railway Labor Act, and during the period May 25 to June 22, 1962, approximately 32 meetings were held with the representatives of the Carriers and the Organizations under the auspices of the chairman of that Board. But the National Mediation Board was unable to bring the parties into agreement.

On June 26, 1962, the National Mediation Board requested and urged that the Carriers and the Organizations enter into an agreement to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C.A. § 157). The Carriers accepted this proffer of arbitration but the Organizations rejected it.

On July 16, 1962, the National Mediation Board advised the parties that in its judgment all practical methods provided for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act.

On the next day, the Carriers issued the promulgation of July 17, 1962, *ante* 1, for which the promulgation of August 6, 1962 was substituted, *ante* 2.

1. As amended, the complaint of the Organizations alleges that the Carriers' promulgation of rules of August 6, 1962 violates the Railway Labor Act.

They argue that it is unlawful because, if given effect, it would destroy the basic ingredient upon which the Railway Labor Act and the other federal labor laws depend for success in the elimination of strikes. They define this essential ingredient as knowledge on the part of the employees and their supervisors of the rates of pay and the terms and conditions of employment, the source of which knowledge is the collective bargaining agreement.

In short, they argue that mutual knowledge granted by collective agreement, tends to promote understanding between the employees and the employer and hence reduces the occasions for surprise, for friction, for discontent, for strikes, and for interruptions to the flow of interstate commerce. They cite *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, and *Labor Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266. They point out that collective bargaining in the railroad industry long antedated the enactment of the Act, especially in the operating crafts, and that it was enacted to prevent unilateral determinations by the carriers. They assert that the promulgation which they now attack would confer on the Carriers just such power of unilateral determination.

In referring to the legislative history of the Act, counsel for the Organizations cite Representative Casey on the floor of the House, when he said, concerning the 1924 bill (65 Cong. Rec. 8923):

> "This bill does not prevent any change in present rates of pay or working conditions, unless the parties agree to a change.

"It does prevent an arbitrary change of wages or rules without notice or opportunity for conference, after which, if an agreement can not be reached, the parties are free to act independently."

The Organizations' cause of action is set forth in the amended complaint as follows:

"Said second Promulgation is in violation of Section 2, First of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees * * * the minimum number of such assignments to a train or engine, and the classification of such assignments, * * * notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements * * * to contain such rules * * *."

They rely particularly upon 2, First and Seventh (45 U.S.C.A. 152, First and Seventh), and 6 of the Railway Labor Act as indicating that congress intended to achieve stability in conditions and rules under which railway employees perform their services. Section 2, First, provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the applications of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh, provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Act reads:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. * * *"

The Supreme Court described the nature of the procedures provided by the Railway Labor Act which we deem relevant here, in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945), where the court said, at 724, that, to induce agreement for the settlement of disputes, the first of three stages required is negotiation, which seeks voluntary action by both sides, in the sense that agreement is sought and cannot be compelled. At 725, the court added:

> "Beyond the initial stages of negotiation and conference, however, the procedures diverge. 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Traimen v. Toledo P. & W. R. R. Co.*, 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agree-

ment is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

In *Terminal Assn. v. Trainmen*, 318 U.S. 1, 6, the court made these observations which are pertinent here:

"The Railway Labor Act, like the National Labor Relations Act [29 U.S.C. § 151 *et seq.*], does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. *The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.*" (Italics supplied.)

That language suggests this quotation from *Labor Board v. American Ins. Co.*, 343 U.S. 395, 402:

"The theory of the Act [National Labor Relations] is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

"Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences.

> Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.' • • •"

In *California* v. *Taylor*, 353 U.S. 553, 566, speaking of the Railway Labor Act and its machinery for conciliation, mediation, arbitration and adjustment of disputes, the court said:

> "• • • A primary purpose of this machinery of railway government is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein. . . .' • • •"

and also

> "• • • Its continuous operation is important to the national flow of commerce."

While in this case both parties recognize that collective bargaining between the Organizations and the Carriers is required by the Railway Labor Act, *Virginia Ry.* v. *Federation*, 300 U.S. 515, we know of no requirement as to precise form or method of such bargining. For that reason, we conclude that the conference between the respective parties on individual railroads, following the service on November 2, 1959 of the Carriers' notices, were steps in collective bargaining and that the same is true of the national conferences thereupon held and extending through October 17, 1960. Furthermore it is our opinion that the October 17, 1960 agreement between the Carriers and the Organizations providing for a commission, as hereinbefore set forth, is to be considered as another step in collective bargaining, especially inasmuch as it was expressly agreed that the Commission's mediatory efforts and report should be considered and accepted as in lieu of the somewhat similar procedure provided by the Railway Labor Act.

In reviewing the history of the Carriers' notice of proposed rule changes on November 2, 1959, we find that these proposals were a proper subject of bargaining procedures and at all levels as required by law. Significantly the proffer of arbitration by the National Mediation Board, although accepted by the Carriers, was rejected by the Organizations.[4] While the Organizations participated in the various procedures, their refusal to conform to the results reached by the machinery set up for the purpose of avoiding interruption to commerce reduced their participation in the various steps of negotiation to a mere "sterile discussion" of differences, thus placing the Carriers in a position to exercise their prerogatives to unilaterally put into effect their proposed changes, unless proscribed by the Railroad Labor Act. *Labor Board* v. *American Ins. Co.*, *ante* 11.

We have reached the following conclusions which are applicable to the situation now before us:

(a) There is an area in the administration of a railroad business in which management is free to operate without consultation with the representatives of its employees.

(b) The exercise of management's prerogatives is however subject to the employees' right to bargain collectively in areas covering rates of pay, rules and working conditions of the employees, and on the question whether these areas include the proposed rules before us relating to the operating employees of the railroad.

(c) When, after compliance with the procedural requirements of the Act relating to a proposed change in an existing agreement or the introduction of new terms where no agreement exists, resort to collective bargaining fails without the fault of management, it may there-

[4] Although they violated no legal obligation by their refusal. 45 U. S. C. A. § 157, First. Cf. *E. J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 540, 544.

after freely exercise its managerial prerogatives in such areas of operation as may have been up to then disputed.

2. While disclaiming any contention that a carrier may not, after complying with the procedural requirements of the Act and failing to reach agreement, change the rules governing the employment relation, the Organizations argue "that unilaterally established rules must be rules and not a 'rule' that there shall be no rules, and that such a 'rule' that there shall be no rules can be established, if at all, only by agreement".

In view of this contention we have examined the contents of the promulgation under attack and we find that a set of rules is contained in three articles entitled:

I—Use of Firemen (Helpers) on Other Than Steam Power

II—Basis of Pay and Assignment of Employees

III—Consist of Crews.

While the length of this opinion does not permit our including a reproduction of the material set forth in the promulgation, we have examined it carefully and find that it is a statement of detailed rules affecting the work and pay of the operating employees of the railroads. It is not in any way subject to the criticism of being a rule that there shall be no rules. Moreover, a rule regulating the work of operating employees on a railroad is by its nature subject to change. It is not like the immutable laws of the Medes and Persians. It is subject to alteration from time to time consistently with the duties of the carriers to the employees and the public which uses their lines.

We conclude that the promulgation of these rules was an act of management within the area in which the Carriers had a right to exercise their prerogatives without consulting or obtaining approval of the representatives of their

employees, after the Carriers' required submission to collective bargaining had been frustrated by the Organizations, although they had a legal right to do so.

3. Having reached that conclusion, we are compelled by the course pursued by the Organizations through the various procedures, culminating in their rejection of a proffer of arbitration by the National Mediation Board, to hold that such conduct by the Organizations justified the railroads putting into effect the original rules reannounced in their promulgation of August 6, 1962.

4. The Organizations in this court make a separate attack upon the promulgation of August 6, 1962 by charging that it "is susceptible of the interpretation that it announces the repudiation of 'craft' or 'class' in certain situations, a concept at the very heart of the Railway Labor Act." However, the Carriers call our attention to the fact, which is not denied by the Organizations, that this contention was not raised in the district court, either by argument or in the complaint, as amended. This statement is not questioned by the Organizations in their subsequent reply brief. This contention comes too late now. However, we have given consideration to the point raised and as a result are of the opinion that the Carriers are right in the assertion which they have made, and which we repeat:

> "* * * The promulgation simply gives the carriers the right to determine the number of trainmen that shall be used in road train crews and of that number how many are to be assistant conductors, ticket collectors, baggagemen and brakemen. All such employees are now represented by the same organizations for purposes of collective bargaining. It likewise gives the carriers the right to use road crews in yard service and yards crews in road service; but the several classes or crafts involved are represented by the same organizations whether they work in road or yard service. It is clear, therefore, that the organizations' real complaint goes to the carriers' assignment of work. The Railway Labor Act does not deal with this subject."

5. We are aware that the Organizations clearly informed the district court in their complaint, as amended, that

> "If the defendants and the carriers represented by them proceed to put into effect the revisions contained in their second Promulgation, the plaintiffs will be forced to resist said revisions by asking those they represent who are employed by the carriers represented by the defendants to withdraw from the service of said carriers until said second Promulgation is cancelled. * * *"

We would like to believe that this unnecessary threat of a strike of such magnitude as to amount to a national transportation paralysis was ill-advised. If we are wrong in that assumption, then we shall remind the persons responsible that they are dealing with railroad properties which are impressed with a public interest, which is paramount to that of all the litigants in this case. Always invisibly present as a nonparticipating party, at the bargaining table and at every stage thereafter, have been the people of the United States, to whose interest that of the Organizations and the Carriers is subordinate. Through their representatives in congress, the people may resort to such governmental power as is necessary to assert their superiority to any private interest, whether corporate or otherwise. The Carriers enjoy a regulated monopoly in their field. The Organizations enjoy an immunity from the restrictions of anti-trust laws. These references suggest only some of the ways in which the people might respond if any party to this suit resorts to an economic force which would jeopardize the nation, more than the opposing litigant in this case.

For the reasons which we have set forth herein, the order of the district court dismissing the complaint, as amended, and denying a motion for a preliminary injunction is affirmed.

ORDER AFFIRMED.

APPENDIX B

Final Order of the District Court

1. On the 26th day of July, 1962, a complaint for injunction and declaratory judgment was filed in this cause by the plaintiffs herein in which it was alleged, among other things, that a notice and promulgation of revisions in work rules for operating employees of the defendant railroads who are represented by the plaintiff organizations, to become effective on the 16th day of August, 1962, and certain rules or rules changes contained in said promulgation were in violation of the Railway Labor Act. The aforesaid notice and promulgation, which are dated July 17, 1962, are attached to said complaint and there marked "Appendix A."

2. By order of the Court, and with the agreement of the parties, this cause was thereafter set for Monday, August 6, 1962, for the presentation of and hearings on such written or oral motions as the parties might wish to present or have heard.

3. Said cause came on for hearing on said 6th day of August, pursuant to said order, and appearances having been duly entered, the plaintiffs filed their written motion for a preliminary injunction on the grounds set forth in the complaint; and the defendants orally moved to dismiss the complaint on the grounds that this suit has been prematurely brought before the dispute involved has been submitted to and considered by an emergency board, under Section 10 of the Railway Labor Act, and because the plaintiffs have not exhausted their administrative remedies provided in said Act.

4. After arguments had been heard both for and against defendants' motion to dismiss the complaint, the defendants, on said 6th day of August, 1962, with leave of Court and without objection from the plaintiffs, withdrew their notice and promulgation of rules changes dated July 17, 1962, which are attached to the complaint and there marked

"Appendix A," and served upon the plaintiffs a second notice and promulgation of rules changes, dated August 6, 1962, which have been admitted in evidence and marked defendants' Exhibit 1. The defendants then presented their oral motion to dismiss the complaint on the grounds that the issues therein tendered had become moot.

5. On Tuesday, August 7, 1962, this cause came on for further hearings on the aforesaid motions; and the Court, for reasons stated in the oral opinion of the Court, which appears in the transcript of its proceedings on August 7, 1962, and which by reference is incorporated herein, overruled and denied the defendants' motion to dismiss the complaint described in paragraph 3 above.

6. Opportunity was then given to the parties to present further arguments and evidence in support of and in opposition to the defendants' motion to dismiss the complaint on grounds that the issues tendered in the complaint had become moot; and the Court then found that because the notice and promulgation complained of in the complaint had been withdrawn by the defendants, without objection from the plaintiffs, the issues tendered in the complaint and in the plaintiffs' motion for preliminary injunction had become moot, and defendants' second motion to dismiss the complaint was thereupon granted and the complaint was dismissed by order of the Court.

7. The plaintiffs thereupon orally moved the Court for leave to amend the complaint or to file an amended complaint for the purpose of alleging that the second notice and promulgation of the defendants, dated August 6, 1962, which have been marked defendants' Exhibit 1, also violate the provisions of the Railway Labor Act; and, following arguments of counsel, plaintiffs further requested and were granted leave to present their motion together with their proposed amendments or amended complaint in writing in open court at 10 a.m. on Wednesday morning, August 8, 1962.

8. At said time and place plaintiffs did present their motion in writing and leave was then and there granted to the plaintiffs to file amendments to their complaint or an amended complaint; and plaintiffs thereupon duly filed their amendments to their complaint or amended complaint with the Court; and simultaneously filed a second motion for a preliminary injunction.

9. The defendants then moved to dismiss the amended complaint filed by the plaintiffs on grounds that said amended complaint fails to state a claim upon which relief can be granted.

And the Court, having heard arguments of counsel, both in support of and in opposition to the defendants' motion to dismiss, and being fully advised in the premises, does hereby order, adjudge and decree that the second motion for a preliminary injunction is denied and that this suit and the amended complaint of the plaintiffs shall be and hereby are dismissed because plaintiffs' amended complaint fails to state a claim upon which relief can be granted.

Entered this 8th day of August, 1962.

(Signed) J. S. Penny
Judge

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Wednesday, November 28, 1962

Before Hon. ELMER J. SCHNACKENBERG, Circuit Judge, Hon. LATHAM CASTLE, Circuit Judge, Hon. LUTHER M. SWYGERT, Circuit Judge

No. 13876

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Plaintiffs-Appellants,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing the complaint, as amended, and denying a motion for a preliminary injunction, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX D

Statutes Involved

The Railway Labor Act (48 Stat. 926, 45 U.S.C. § 151 *et seq.*) provides:

* * * * * *

"Sec. 2. * * *

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort, to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * * * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice. * * *

* * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * * *

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any car-

rier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class . . .

. . . . . .

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in

which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

. . . . . .

"Sec. 3. First. There is hereby established a Board to be known as the 'National Railroad Adjustment Board' * * * and it is hereby provided -

. . . . . .

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostlers helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

. . . . . .

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or con-

ferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."